Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter Of	)	
Petition of AT&T Services, Inc. For Forbearance Under 47 U.S.C. §160(c) From Enforcement Of Certain Rules For Switched Access Services And Toll Free Database Dip Charges	)	**WC Docket No. 16-363**

O1 COMMUNICATIONS, INC.'S OPPOSITION TO PETITION OF AT&T SERVICES, INC. FOR FORBEARANCE UNDER 47 U.S.C. §160(c)

I. INTRODUCTION AND SUMMARY

O1 Communications, Inc. ("O1") hereby opposes the Petition of AT&T Services, Inc., on behalf of its affiliates ("AT&T") asking the Federal Communications Commission ("FCC" or "Commission") to forbear from its rules concerning: (1) switched access services related to tandem and transport service provided on calls to carriers engaged in access stimulation; and (2) database query charges to long distance carriers for toll free services. This is only a small subset of the numerous intercarrier compensation issues raised by the Commission in its Further Notice of Proposed Rulemaking ("FNPRM") accompanying its November 2011 Intercarrier Compensation Reform Order.[1] Except for a brief cite to its own comments,[2] nowhere in AT&T's Petition does AT&T reference the myriad concerns raised in comments responding to the FNPRM describing the harm resulting to service providers if the Commission reduced transit/tandem rate elements and access charges associated with 8YY traffic to bill and keep.

[1] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (rel. Nov. 18, 2011) ("ICC Reform Order").
[2] AT&T Petition, footnote 16.

Rather than isolate these issues and resolve outstanding questions of intercarrier compensation reform on a piecemeal basis based on one interexchange carrier's ("IXC's") opinion of what should take priority, the Commission should deny the Petition and, if necessary, address these matters considering the viewpoints of all affected carriers in the context of the existing open rulemaking.

As a threshold matter, on its face the Petition appears to be limited, requesting forbearance only for tandem and transport service *relating to calls to carriers engaged in access stimulation* and AT&T attempts to justify its request through its condemnation of "high per minute and per mile transport charges" of "access stimulating LECs." A careful reading of the footnotes in the Petition reveals, however, that the scope of AT&T's request reaches far beyond LECs intentionally partnering with parties engaged in what the Commission has defined as "access stimulation." AT&T asks that the FCC's granting of forbearance apply to *all LEC tandem and transport services*.[3] In another footnote, AT&T also explains that the Petition presumes that granting AT&T's request would de-tariff not only interstate tandem services but all intrastate access services as well.[4] The wide-ranging legal and practical issues raised by the footnotes alone require that the Commission consider these issues, if at all, in the context of an industry-wide rulemaking rather than an isolated Petition filed from the standpoint of one affected carrier.

At a minimum, the scope of the request is unclear, which requires the Commission to deny the Petition solely on that ground since failure clearly to identify the carriers whose rates are affected renders the Petition not "complete as filed" as required by the FCC's rules. As

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[3] *See* footnote 21 of AT&T's Petition.

[4] AT&T Petition at footnote 22 (..."As such, the Act and the Commission's scheme would provide the exclusive means of compensation for tandem-switching and transport service (or any access service). Accordingly LECs cannot recover under the alternative state-law theories and any attempts by states to directly or indirectly regulate intercarrier compensation would be preempted.")

discussed more fully below, these are only two examples of the multiple ambiguities present in AT&T's Petition that require the Commission to reject AT&T's request.

The Commission should also deny AT&T's Petition because AT&T fails to carry its burden to demonstrate that granting its Petition is necessary for the public interest, fails to demonstrate that granting its Petition is necessary for the consumer good and fails to demonstrate that granting its Petition is necessary to ensure just, reasonable and non-discriminatory rates for tandem switching, transport services or database query charges for toll free services. While the Petition pays lip service to these factors, it fails to prove them and conveniently leaves out a discussion of the disastrous effect granting the forbearance will have on competition against the incumbent local exchange carriers ("ILECs") and their affiliates in the transit/tandem switching and transport markets and the 8YY market. AT&T's failure to prove any one of the three factors defeats the Petition in its entirely. AT&T must demonstrate that all three of these factors have been satisfied, which it has not done.

II. STANDARD OF REVIEW

47 U.S.C. § 160(a) allows the FCC to forbear from applying any regulation or provision of the Telecommunications Act to a telecommunications carrier or telecommunications service if it determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest. These three prongs of the forbearance test are conjunctive, meaning that the Commission could properly deny a petition for forbearance if it

finds that any one of the three prongs is unsatisfied. *In re Core Communs., Inc.*, 455 F.3d 267, 269 (D.C. Cir. 2006).

The burden of proof to demonstrate that forbearance is appropriate is on the party seeking forbearance, in this case, AT&T. *Verizon & AT&T, Inc. v. FCC*, 770 F.3d 961, 967 (D.C. Cir. 2014); *Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1226 (10th Cir. 2012). FCC regulations also require the petition to be "complete as filed," that is, AT&T must identify clearly in the petition the scope of the requested relief, establish a prima facie case that the statutory criteria for forbearance are satisfied, provide necessary evidence and identify related matters. 47 C.F.R. § 1.54; *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016). In adopting this requirement, the Commission found the "complete as filed" standard necessary in order to make the process fairer, more manageable and more predictable. *In re Petition to Establish Procedural Requirements to Govern Proceedings,* Report and Order, 24 FCC Rcd 9543, 9549-9550 at para. 12.

III. DISCUSSION

A. Expansion of the Access Stimulation Rules, if Necessary, Should Take Place in the Commission's ICC Reform Order Docket, Not in the Context of a Petition for Forbearance filed by One Interexchange Carrier.

In its ICC Reform Order, the FCC focused on rules limiting stimulation of end user traffic terminated in LATAs with higher than average terminating access rates. The access stimulation rule adopted by the FCC as part of the ICC Reform Order was designed to curb abusive traffic stimulation schemes designed artificially to increase the level of terminating traffic to network providers that charged high termination rates.[5] The FCC intentionally narrowly tailored the access stimulation rule to "minimize costs of the rule revisions on the industry, while reducing the adverse results of access stimulation and ensuring that interstate

[5] ICC Reform Order at paras. 656, 661-666.

access rates are at levels presumptively consistent with section 201(b) of the Act."[6] At that time, the Commission expressly declined to expand the application of access stimulation outside of terminating access charges, instead electing to solicit and consider comments from affected parties with regard to whether similar rules should be enacted to minimize arbitrage activities associated with other rate elements.[7]

Thousands of pages of Comments were filed in response to the FNPRM by affected parties representing all sectors of the industry.[8] Rather than act in piecemeal fashion and resolve a small subset of the numerous legal and factual issues in this proceeding in the context of one market participant's priority list, the Commission should address these issues in the far reaching rulemaking aimed to consider the issues in the context of overall intercarrier compensation reform.[9]

As set forth in detail below, for one, the ability of the FCC to expand properly – if at all -- access stimulation rules to originating and terminating tandem switched access and tandem transport rate elements is hampered by fundamental differences in the interpretation and implementation of the existing rule by multiple affected parties. Rather than reduce the number of disputes and stabilize the intercarrier compensation system, the IXCs' manipulation of the access stimulation rule adopted by the FCC in late 2011 has given rise to additional disputes and affected a broader range of LECs than had been affected prior to the adoption of the rule. The issues raised by the IXCs' refusal to pay access bills relating to the interpretation and implementation of the access stimulation rule have continued to cause instability in LEC

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[6] *Id.* at para. 660.
[7] *Id.* at para. 800, 817-821.
[8] *See* FCC Website, ECFS Database, CC Docket No. 01-92, Opening Comments filed February 24, 2012 and Reply Comments filed March 30, 2012.
[9] *See, In the Matter of the Development of a Unified Intercarrier Compensation Regime,* Declaratory Ruling, CC Docket No. 01-92 (rel. Feb. 11, 2015) ("VSR Declaratory Ruling") at para. 25.

intercarrier compensation revenues and impede LEC investment. If the Commission were to grant AT&T's Petition to expand the access stimulation rules, not only would additional issues arise, the existing disputes would be incorporated into the implementation of any such forbearance order as well. Rather than add to the current disputes over access stimulation, the FCC should deny AT&T's request and if it finds it necessary, address the issues raised by AT&T's Petition in the context of the open rulemaking proceeding.

Moreover, AT&T's Petition is focused on the behavior of a limited number of carriers doing business in Iowa and South Dakota, not behavior of LECS industry wide.[10] Given the absence of any evidence by AT&T of pervasive abuse, it is premature for the FCC, particularly in light of the limited opportunity for the development of a complete evidentiary record, to expand its access stimulation rules in the context of this docket. Implementing such drastic changes without a more robust understanding of the impact of the proposed changes on all sectors of the industry may likely discriminate against, and unnecessarily limit the ability of LECs to receive fair compensation for their services. Such restrictions may also lead to an increasingly concentrated marketplace, which is the exact opposite of the goals the Communications Act was meant to achieve.[11]

B. The Petition Must be Denied with Regard to Tandem Switching and Transport Services Because the Scope of Affected Carriers is Not Specified.

The FCC's ability to analyze a petition for forbearance is highly dependent on knowing the exact scope of the requested forbearance. *In re Telecomms. Carriers Eligible for Universal Serv. Support,* 26 FCC Rcd 13723, 13726 (2011) (citing *Petition to Establish Procedural*

[10] AT&T Petition at pp. 15-18.

[11] *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 3 ("Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition.")

Requirements to Govern Proceedings, Report and Order, 24 FCC Rcd 9543, 9551, 9553 (2009) at para. 16.) Identifying the exact scope of the request requires the petition to state the following with specificity: (1) each statutory provision, rule or requirement from which forbearance is sought; (2) each carrier, or group of carriers, for which forbearance is sought; (3) each service for which forbearance is sought; (4) the geographic location, zone, or area in which forbearance is sought; and (5) any other factor, condition, or limitation relevant to determining the scope of the requested relief. *Id.*

A cursory review of AT&T's Petition may lead one to conclude that AT&T clearly identified the group of carriers to which its forbearance petition applies: "All LECs, including intermediate LECs and centralized equal access ("CEA") providers, on calls originated by or terminated to LECs engaged in access stimulation, as defined in 47 C.F.R. Section 61.3(bbb)." Appendix A to AT&T's Petition. The problem lies in the multiple ambiguities involved in interpreting and enforcing AT&T's proposed condition that forbearance apply to "calls originated by or terminated to LECs engaged in access stimulation."

First, while the de-tariffing request appears only to apply to tariffs of LECs engaged in access stimulation, footnote 21 of the Petition reveals AT&T's true intent:

> The forbearance sought applies to *all LECs.* Thus, even if a LEC is not itself engaged in access stimulation, a LEC may not lawfully tariff (or bill pursuant to tariff) for transport or tandem access charges for any calls to or from a LEC engaged in access stimulation. In many cases, the excessive tandem and transport charges are being billed by an intermediate carrier that may not have direct contractual arrangements with a provider of free calling services. Nevertheless, once forbearance is granted, such LECs could not lawfully tariff tandem or

transport charges for any traffic routed to or from a LEC engaged in access stimulation. (Emphasis added)

Therefore, while the point is only clearly articulated in a footnote, AT&T proposes that all LECs on an industry-wide basis modify their tariffs to exclude charges for tandem switching and tandem transport services whenever the LEC carries a call to or from an access stimulating LEC.

Among the numerous issues that will be raised by the IXCs if this rule were to be adopted include: Which LECs are those "engaged in access stimulation?" No official list of "access stimulating LECs" exists. Who determines which LECs fall into that category? From a practical perspective, the IXCs like Petitioner that use self-help tactics and refuse to pay CLEC access bills will unilaterally determine which LECs fall into that category. Would the prohibition of tariffing apply to calls to or from such a LEC industry-wide and nationwide or only when originating or terminating traffic through particular intermediaries or certain geographies? What if the LEC only stimulates access traffic in one direction (which by definition is always the case)? In that case, would it be appropriate to apply the prohibition of charging for the traffic to both directions of traffic to and from that access stimulating LEC? How would this limitation advantage or disadvantage non-vertically integrated LECs compared to the vertically integrated LECs like AT&T, Verizon and CenturyLink, which are affiliated with the largest IXCs? Similarly, how would ILECs generally be affected compared to non ILECs? These are only a few of the uncertainties regarding the scope of AT&T's Petition which are not addressed by the Petition. These uncertainties make it impossible for the Commission to define the true scope of AT&T's requested relief. What is clear is that it expands beyond curtailing arbitrage activities of LECs that actively engage in access stimulation, which is the stated goal of the proposed relief.

In addition, these uncertainties would exacerbate the problems that already exist in the industry as a result of the IXCs' self-serving interpretation, implementation and enforcement of the Commission's access stimulation rule, 47 CFR §61.3(bbb). Both AT&T and Verizon's IXC affiliates have over-broadly construed the rule to justify billing disputes and to exercise self-help tactics by not paying numerous CLEC access charge invoices, forcing the CLECs to either accept pennies on the dollar or initiate litigation to enforce their tariffs and attempt to be paid.[12] Issues raised by the IXCs include which categories of traffic should be included in the 3 to 1 ratio of originating to terminating traffic test. A decision to include or exclude particular categories of traffic in this test may alone determine whether the 3 to 1 ratio is, or is not met. Not surprisingly, AT&T's view of what traffic to include results in an overstatement of the number of CLECs which allegedly engage in access stimulation.

Another dispute raised by the IXCs concerns what happens when a CLEC triggers the 100% growth test in one month in a year but does not continue in subsequent months to trigger this test. When satisfying the trigger is an anomaly for that particular month, is the CLEC required to adopt the lowest price cap carrier's rate at all? Or, should it adopt it only for the month the test was triggered? Or, should it be for a longer time period? If the latter, what time period applies? Once again, AT&T's version of the answer to these questions prolongs the time period that the lower rates would apply. These are only two examples of numerous disputes regarding the interpretation and implementation of the access stimulation rules that are currently being litigated. Because AT&T's Petition specifically incorporates the access stimulation rule

[12] Examples of lawsuits filed recently by CLECs to combat the IXCs' self-help tactics include: Peerless Network Inc. v. MCI Communications Services, Inc. Case No. 14-cv-7417, U.S.Dist.Ct., N.D. IL, E.D.; Peerless Network Inc. v. AT&T Corp., Case No. 15-cv-870, U.S.Dist.Ct. S.D. NY; Teliax, Inc. v. AT&T Corp., Case No. 1:15-cv-01472-RBJ , U.S.Dist.Ct., D. CO; O1 Communications, Inc. v. AT&T Corp, Case No. 3:16-cv-01452-VC, U.S.Dist.Ct. ND CA; Broadvox-CLEC, LLC v. AT&T Corporation, Case No. PWG-13-1130, U.S.Dist.Ct SD MD.

into the forbearance request, in addition to raising new disputes as to the scope of the proposed forbearance, these existing disputes would be incorporated as well.

In addition to raising numerous disputes over the interpretation and implementation of the rule, AT&T and Verizon have failed to follow the process that the FCC designed to resolve access stimulation issues. Therefore, rather than involving the FCC in the process of determining whether access stimulation exists, AT&T and Verizon have taken it upon themselves unilaterally to declare a CLEC to be an "access stimulator" whose tariffed rates the IXCs need not pay. Expanding the access stimulation rule as requested by AT&T's Petition would encourage the IXCs to continue unilaterally to declare a CLEC to be an access stimulator and fail to follow the process proscribed.

In the ICC Reform Order, the FCC set forth a process for enforcing its newly adopted access stimulation rule:

> 699. The revised interstate access rules adopted in this Order will facilitate enforcement through the Commission's complaint procedures, if necessary.[13] A complaining carrier may rely on the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint. This will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission's rules. The LEC then would have the burden of showing that it does not meet both conditions of the definition. We decline to require a particular showing, but, at a minimum, an officer of the LEC must certify that it has not been, or is no longer engaged in access revenue sharing, and the LEC must also provide a certification

[13] Given the two-year statute of limitations in section 405 of the Act, 47 U.S.C. § 405, a complaining IXC would have two years from the date the cause of action accrued (the date after the tariff should have been filed) to file its complaint. Because the rules we adopt are prospective, they will have no binding effect on pending complaints.

from an officer of the company with whom the LEC is alleged to have a revenue sharing agreement(s) associated with access stimulation that that entity has not, or is not currently, engaged in access stimulation and related revenue sharing with the LEC.[14] If the LEC challenges that it has met either of the traffic measurements, it must provide the necessary traffic data to establish its contention. With the guidance in this Order, we believe parties should in good faith be able to determine whether the definition is met without further Commission intervention.

If a dispute over the issue arose, the FCC designed this straightforward process to assist the parties to determine in a timely manner whether access stimulation was occurring. Rather than use this process, AT&T, for one, has devised its own process for self-policing the FCC's rule. First, it accuses a CLEC of access stimulation based on a traffic study consisting only of AT&T's exchange of traffic with the CLEC and discontinues payment. Next, based on O1's experience, after the CLEC presents AT&T with its traffic study demonstrating that it does not satisfy the 3 to 1 ratio based on the CLEC's industry wide traffic, rather than file a complaint at the FCC to resolve the dispute as instructed, AT&T simply continues to refuse to pay based on its own limited study and completely ignores or disputes the validity of a CLEC's study. This approach allows AT&T to force CLECs that want to be paid to either reluctantly agree to accept an amount less than the tariffed rate as compensation for the CLEC's access services or file a

[14] The Ohio Commission argues that the Commission should not prohibit rebates, credits, discounts, etc. Ohio Commission Section XV Comments at 13-14. Section 203(c) (1) provides that no carrier shall "charge, demand, collect, or receive a greater or less or different compensation for such communication…than the charges specified in the schedule then in effect." 47 U.S.C. § 203(c) (1). A corollary to subparagraph (1), section 203(c) (2) provides that no carrier shall "refund or remit by any means or device any portion of the charges so specified." 47 U.S.C. § 203(c) (2). This prohibition on rebates is intended to preclude discrimination in charges, and the practice may be subject to sanctions under section 503. 47 U.S.C. § 503.

lawsuit against AT&T to enforce its tariff to collect the tariffed charges. If the CLEC chooses to file a lawsuit, not only is it saddled with litigation costs and attorney fees, but because of the FCC's prohibition on blocking traffic, it is also required to continue to provide the services to AT&T for free or at significantly reduced rates during the multi-year pendency of the litigation.

AT&T exercises this self-help despite the FCC's reminder in its access stimulation discussion in the ICC Reform Order that it "does not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions" and its words of caution to non-paying long distance carriers "of their payment obligations under tariffs and contracts to which they are a party."[15] The FCC presumed that the clarifications of its ICC Reform Order surrounding access stimulation and revenue sharing agreements would reduce disputes between carriers regarding their payment obligations for switched access services.[16] Perhaps this would have occurred if the IXCs like Petitioner AT&T, complied with the Order, including following the process for resolving a dispute over whether a CLEC is engaging in access stimulation. They have not. Consequently, their disputes and self-help non-payment tactics continue unchecked despite the clarification and direction provided by the Commission.

If past behavior is any indicator of future behavior, if the Commission were to grant AT&T's request for forbearance from its rules for switched access services related to tandem transport service "provided on calls to carriers engaged in access stimulation," AT&T and other IXCs will use the above issues as to the scope of the request to justify further disputes and continue to engage in self-help non-payment. Accordingly, rather than serve the public interest and the consumer good, granting the request will harm the public interest and consumer good by

[15] *Id.*, para. 700.
[16] *Id.*

damaging the competitive marketplace by creating fodder for additional billing disputes and unilateral determinations by the IXCs as to when and to whom forbearance applies.

Because AT&T's Petition fails to specify the exact scope of the requested forbearance and, in fact, the scope is impossible to determine as a result of the issues described above, it does not satisfy the FCC's requirement that it be complete as filed.[17] Therefore, the Petition must be denied.

C. The Petition Must be Denied Because AT&T Fails to Demonstrate that Granting the Petition is in the Public Interest.

Under the third criterion, "the Commission shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." *United States Telecom Ass'n v. FCC,* 825 F.3d at 727. To the extent that the relief sought by AT&T would harm competition, the Commission must deny AT&T's Petition since it would not be in the public interest to grant such a request.

1. Granting AT&T's Petition Will Destroy Competition in the Transit/Tandem Switching and Access Services Market.

AT&T's Petition complains that the Commission has failed to adopt "bill and keep" - by which carriers do not charge each other for the use of their networks but instead recover their costs from their end users – for originating access charges and tandem switching and transport services, despite the Commission's expressed preference of bill and keep over the traditional access charge system.[18] AT&T urges the Commission to do so now and attempts to justify its

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[17] These comments do not address in detail the additional key legal and policy issue raised by AT&T in footnote 22 as to whether granting AT&T's Petition would pre-empt state regulation of the intrastate tariffing of tandem access charges. See Comments filed by Cbeyond, Earthlink, Integra Telecom and tw telecom in the ICC Reform Docket dated February 24, 2012 for a thorough discussion of why the FCC does not have jurisdiction to issue an order de-tariffing intrastate originating switched access charges as requested by AT&T in footnote 22.

[18] For example, see AT&T Petition at pp. 1-3, 5, 8-9.

request for reducing all LEC originating and terminating tandem access charges to bill and keep by arguing that forbearance is "necessary to protect ratepayers and IXCs from being forced (i) to contribute to the "inflated profits" of LECs engaged in access stimulation and (ii) to subsidize users of "free" conference and chat line services."[19]

Transiting and tandem switching and tandem services are provided when a carrier serves as an intermediary in the call flow, transmitting traffic between two carriers that directly serve the calling and called parties. Intermediaries do not directly serve either the called or calling parties. Traditionally, local intermediary services are described as "transit" services and long distance intermediary services are described as "tandem switching and tandem transport." The functions performed are the same. The discussion that follows applies equally to local and long distance intermediary services.

Contrary to AT&T's implications in its Petition, the existence of intermediary service providers is "not a sign of arbitrage activity or an opportunity for inappropriate cost-shifting" by terminating carriers. Rather, it is a sign of ongoing competition in the market to ILEC services which provide intermediate delivery of traffic between originating and terminating carriers.[20] For various reasons, carriers and other service providers do not always physically interconnect with each other. The partnership between Voice Over Internet Providers ("VoIP") providers and LECs is a key example of the use of intermediate carriers efficiently to complete calls between end users of different service providers when a service provider does not own its own network or interconnect with the PSTN. VoIP providers typically do not maintain their own networks and do not enter into Section 251 interconnection agreements with ILECs. Service providers, including VoIP providers, directly serving the calling party generally bear the cost to transit

[19] AT&T Petition at p. 4.
[20] See Opening Comments of Neutral Tandem in response to the FNPRM, CC Docket 01-92, dated February 24, 2012 at p. 4.

customer traffic to the outside world and have choices of how to do so. They can employ their own infrastructure, lease infrastructure from other carriers, purchase switched transport by the minute of use, or use a variety of these options at once. If the sending provider relies on another provider rather than build its own network, it can choose among a number of wholesale providers. That provider may be the terminating carrier, a third-party alternative or some combination of the two. No matter which option is chosen, the financial obligation to transport the call remains with the sending provider. If a sending provider relies on a third party or the terminating carrier, it must pay the carrier, which in effect it has hired as a subcontractor for performing that function.

Third party carriers that bridge the gap between originating and terminating carriers must be compensated for the services they provide. In direct connection, bill and keep makes sense. For one, it is more efficient to require the terminating carrier to recover its costs directly from its own end user customers, who have chosen their network provider, than to permit recovery from other carriers. This is particularly true when traffic exchanged between two networks is roughly balanced.

This rationale for bill and keep has no bearing, however, on the question of compensation for intermediate third party carriers in cases of indirect interconnection. In that context, the sending provider hands off traffic to the third party carrier, which transports it over its own network and in turn hands it off to the terminating carrier. The sending provider has hired this third party to fulfill its financial obligation to deliver traffic to the terminating carrier's network. By definition, the third party provider has no contractual relationship with either the calling party or the called party and it therefore may not recover from either one the costs that it incurs in providing these third party services. Instead, its only relevant customer is the sending carrier,

from whom it must recover its costs; and the sending provider is free to pass through those costs to its end users. The financial arrangement gives the sending provider appropriate incentives either to build out its network or to outsource the same network functions to a third party, depending on whether it is more economically efficient to build or to buy. The Commission would destroy those incentives if it forced third party intermediaries to perform these functions for free, with no hope of cost recovery from anyone who is involved in the relevant traffic exchanges and who causes the relevant costs.

Transitioning these intermediaries to bill and keep would give sending providers incentives to stop any further build out of their networks to the terminating carrier's network because they could now obtain all the same objectives without paying anything. In addition, the third parties that are forced to provide these intermediary services would be left with no compensation to recover all the costs they incur in the process of servicing the sending provider. Although many of those carriers may also have end users of their own, there is no rational justification for imposing on those retail customers the costs of wholesale services designed to support calls between other carriers' retail customers. The FCC should avoid putting competitive tandem/transport access providers in an intermediary position in the call path out of business by mistakenly subjecting them to a bill and keep regime intended for carriers who are serving their own end user customers. This is particularly true in the context of this Petition for Forbearance, which as set forth above, addresses only a subset of relevant issues and is unclear as to its scope.

In its Comments in response to the ICC Reform Order FNPRM, AT&T itself argued against subjecting intermediate services to bill and keep. AT&T agreed that requiring intermediate carriers to provide services at bill and keep would harm competition in the transit/tandem switching and transport market:

> Finally, if the Commission required a designated third party intermediary – presumably the largest ILEC – to supply these services for free, it would immediately undermine the competitive position of that intermediary's competitors. As discussed below, ILECs face strong competition in the market for intermediate services from providers as diverse as Level 3, Inteliquent (formerly Neutral Tandem) and Hypercube. These are highly efficient competitors, but they cannot compete with free. If the Commission "transitioned to bill and keep" for all intermediate services, it would deny these competitive carriers (and not just their ILEC counterparts) any compensation whatsoever for performing services that generate real network costs, and it would drive them from this market. The Commission's goal in this proceeding should be to promote competition, not snuff it out.[21]

In summary, granting AT&T's Petition will destroy competition for intermediary transit and tandem services since reducing compensation for these services to bill and keep will leave these service providers without revenue to cover the costs of services they provide to third party carriers. Harming competition is not in the public interest. Because the relief sought in AT&T's Petition is not in the public interest, the Petition must be denied.

2. Granting the Petition Will Provide an Unfair Advantage to ILECs Which Continue to Possess Market Power over Transit/Tandem Services.

The uncertainty surrounding the scope of the Petition and definition of "all LECs" that provide "switched access service provided on calls to carriers engaged in access stimulation" will likely not only eliminate a key revenue stream and destroy the market for CLEC intermediary services, but it will at the same time, preserve the same revenue stream for ILECs and exacerbate

[21] AT&T Opening Comments, CC Docket No. 01-92, dated Feb. 24, 2012 at pp. 57-58.

the market dominance currently held by large ILECs. These large ILECs, including AT&T, are part of vertically integrated providers of wireless, long distance, transit and termination services.

As described above, the IXCs have over-broadly interpreted and over-broadly applied the FCC's access stimulation rule resulting in increased intercarrier compensation disputes rather than fewer disputes that the Commission envisioned by its adoption of a rule.[22] The process detailed above by which the IXC unilaterally declares a CLEC to be an access stimulator and refuses to pay will continue and will expand to originating and terminating tandem access charges if the Commission chooses to grant AT&T's Petition.

For obvious reasons, ILECs that are affiliated with the IXCs, like AT&T and Verizon, are not subjected to this process. If the Commission were to grant AT&T's Petition, the AT&T and Verizon ILECs will likewise continue *not* to be subject to this process and those ILECs will therefore *not* be subjected to the resulting de-tariffing and loss of revenue. Even if the ILECs modified their tariffs to include the relevant language, as a practical matter, the limitation on charging tariffed tandem charges for tandem and transport services will seldom, if ever, apply.

This practical reality will intensify the market power currently held by the ILECs over the transit and tandem switching and transport markets. ILECs hold market power over transit and tandem services.[23] Unlike ILEC networks, alternative transit providers' networks are not ubiquitous. Therefore, a substantial number of local routes exist on which the ILEC is the only choice for transit service. In addition, federal law only currently requires ILECs to directly interconnect their networks with other carriers. Consequently if non-ILEC carriers refuse to interconnect with a CLEC, the ILEC may be the only available network over which the

[22] ICC Reform Order at para. 700.
[23] Comments of Cbeyond, Earthlink, Integra Telecom, and tw telecom, CC Docket 01-92 filed Feb. 24, 2012 at pp. 11-14.

CLEC may economically transit its traffic destined to carriers with whom it is unable to negotiate direct connection.

Another key reason that ILECs continue to hold market power over these services is that ILECs and their affiliates exercise anti-competitive strategies to force CLECs to continue to buy transit service from the ILEC. For instance, over the last few years, AT&T Mobility has gradually disconnected its direct connection facilities with CLECs requiring the CLECs to re-route traffic destined to AT&T Mobility to transit through the local AT&T ILEC or the AT&T IXC's unregulated Internet Protocol ("IP") termination service. O1 is one of those CLECs. For years, AT&T Mobility and O1 transmitted traffic destined for each other's customers over direct interconnection facilities pursuant to contract. At the beginning of this year, however, because O1 would not agree to unreasonable modifications to the agreement imposed by AT&T Mobility, AT&T Mobility refused to enter into a contract with O1 and unilaterally disconnected the direct connections. One of the unreasonable conditions that O1 disputed required O1 to route all of its interMTA traffic, not over the existing direct connections, but instead indirectly through separate facilities of AT&T Mobility's affiliated IXC pursuant to a separate unregulated commercial agreement. Once AT&T Mobility disconnected the direct connection facilities, O1's traffic destined to AT&T Mobility was and continues to be forced to be transited primarily either over the facilities of the local AT&T ILEC, which collects above cost transit charges for such traffic, or through AT&T's IXC affiliate's commercial IP termination service at a high, unregulated rate, which AT&T has raised several times since it disconnected O1's direct trunking. Granting AT&T's Petition will further exacerbate these types of anti-competitive tactics and lead to continued market dominance by AT&T and other large vertically integrated ILECs.

Competitive transit/tandem providers provide an alternative to ILEC services and so have a significant role to play in improving efficiency in the telecommunications marketplace. For example, on routes where there are capacity constraints to or from an ILEC tandem switch, a CLEC tandem/transport provider may relieve congestion as well as be more responsive to customer needs. Such CLECs serving an intermediary role in the call path should not be driven out of business by being placed within a bill and keep regime simply in response to cursory allegations by AT&T that some sector of the market may engage in what AT&T unilaterally classifies as arbitrage activities. This is particularly true when a practical application of the result of the forbearance will discriminate against smaller non-vertically integrated CLECs in favor of vertically integrated service providers such as Petitioner AT&T.

D. Granting the Petition to De-tariff Charges for 8YY Access Charges, including Database Dips, Would Harm Competition and Consumers by Requiring LECs and their Customers to Subsidize IXC 8YY Services.

The requested forbearance will not only result in the de-tariffing of tandem switching and transport services on the called party's or terminating side of the call but it would also de-tariff LEC originating tandem switching and transport services for 8YY traffic as well. Because there are fundamental differences between terminating and originating access charges, particularly in the context of 8YY service, the ramifications of this aspect of AT&T's Petition must be separately considered by the FCC in its evaluation of the Petition.

Unlike typical phone calls, usage of 8YY service is not controlled by the calling party to an 8YY number. The end user of the originating voice provider is not the "customer" of the 8YY service. Rather, the customer of the 8YY service is the subscriber to the IXC 8YY network to which the originating traffic is routed. Thus the cost causer in the call flow is the 8YY customer that solicits calling parties to call its 8YY number. In addition, 8YY traffic is one

directional – it's not balanced. Consequently the rationale for applying bill and keep and requiring the originating and terminating network providers each to recover the costs from their end users does not apply. [24]

Contrary to the allegations in AT&T's Petition, 8YY originating traffic does not present access stimulation issues. Calling to an 8YY call center is the result of promotion by the offering business of a call center service to the public. 8YY traffic is not stimulated by the calling party's provider but by a customer who accepts the business' invitation to contact the business.[25] In any event, to the extent that AT&T has evidence of specific abuses with regard to 8YY traffic, the FCC has instructed carriers to present such evidence to the FCC in a complaint proceeding involving the particular entities involved or address it in response to the FNPRM in the ICC Reform Docket.[26] They should not be addressed in this forbearance request.

AT&T's Petition also asks the Commission to de-tariff LEC 8YY database "dip" charges.[27] Dip charges are meant to cover the cost to the calling party's service provider to query the 8YY telephone number database in order to be able to route the call to the 8YY service provider to which the called 8YY number is assigned. As AT&T points out in its Petition, the FCC previously refused to regulate CLEC databased dip rates.[28] Nonetheless, AT&T complains that "some CLECs that have tariffed toll-free database query charges that are not just and reasonable and that are in excess of the rates imposed by other LECs."[29] In support of its complaint, AT&T notes that LEC rates range from $0.002304 per call to $0.011 per call. The

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[24] See Reply Comments of Cox Communications, Inc., CC Docket No. 01-92 dated March 30, 2012 at p. 20; Comments of Comcast Corporation, CC Docket No. 01-92 dated February 24, 2012 at p. 6.
[25] See, In the Matter of Access Charge Reform, CC Docket No. 96-262, 19 FCC Rcd 9108(rel. May 18, 2004) (8th Report and Order) at paras. 69-70.
[26] *Id. and VSR* Declaratory Ruling at para. 25.
[27] AT&T Petition at pp. 18-23.
[28] *See, In the of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) at footnote 128.
[29] AT&T Petition at pp. 18-20.

mean rate cited is $0.0044 per call.[30] Ironically, at the same time that AT&T complains of the high rates of others, its CLEC affiliate's federal tariff includes dip rates nearly twice as high as the mean rate cited -- $0.008 per call or higher -- in 15 jurisdictions; the highest rate listed is $0.01272 per call![31]

In any event, like the de-tariffing of LEC originating access charges associated with 8YY traffic, de-tariffing 8YY databased dip charges would unfairly advantage the IXC 8YY service providers by relieving them of legitimate costs required for their provision of 8YY services to their customers. Meanwhile the carriers serving the calling parties receive no revenue from the use of their services and also incur a cost to look up the 8YY numbers in the database. If AT&T's Petition were granted on this issue, this cost would go un-recovered, thereby requiring the calling parties' service providers and their customers to subsidize AT&T's – and other IXCs' - provision of 8YY services to their customers. The Commission should reject AT&T's attempt to shift the cost of its services for which it alone receives revenue to the LEC community whose obligation it is to deliver the 8YY call placed by a caller regardless of whether the LEC receives proper compensation from the 8YY service provider benefitting from the call.

AT&T also advocates that the Commission should adopt bill and keep for 8YY originating access and dip charges in order to minimize problems related to the use by business entities of auto-dialers to artificially stimulate 8YY traffic. To the extent that there may be concerns about abuses such as those involving "hang-up" calls by auto-dialers, these are violations of the Communications Act that are subject to existing enforcement proceeding remedies. There is no rush to implement new, broadly applicable restrictions on originating

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[30] *Id.* at pp. 19-20, footnotes 29-30.

[31] Teleport Communications Group Operating Companies, Tariff FCC No. 2, 1st Revised Pages 243-244 .(effective Jul. 31, 2015)

access charges to address aberrant situations already adequately dealt with by existing commission rules.

Toll free service remains a significant commercial business opportunity. Ultimately there is no economic or policy reason that LECs whose customers dial 8YY calls to other providers should be required to lower originating 8YY access rates or forgo dip charges solely for the benefit of IXCs like Petitioner and their customers. Since the cost causing customer is the one that purchases 8YY service from IXCs like AT&T, the fees should not be imposed on the calling customers. Instead, cost causation principles require that the underlying costs for the service should be paid by the IXCs that receive 8YY calls and their customers who receive the benefit of increased contacts to their businesses as a result of the calls. To do otherwise would not only harm competition in the 8YY market but also harm consumers by requiring consumers unnecessarily to subsidize service to businesses.

E. The Commission Must Deny the Petition Since Consumers Will Be Harmed By the Destruction of Competition in the Intermediary Services Market.

AT&T argues that consumers would benefit from the de-tariffing of LEC tandem access charges for "calls to or from LECs engaging in access stimulation" for the same reason that consumers benefit generally from the regulation of access stimulation, that is, consumers who don't use free high call volume services, such as chat lines and conferencing calling, are not forced to subsidize the use of free services by others.[32] This, however, is only one factor to be considered in the analysis. The negative impact that AT&T's request would have on the competitive market for intermediary services significantly outweighs the potential for some consumer benefit that may or may not result by eliminating an alleged subsidy from one consumer group to another.

[32] AT&T Petition at pp. 16-17.

As demonstrated above, eliminating the ability of CLECs to tariff and collect tandem switching and transport access charges would destroy the competitive market for intermediary services leaving only large vertically integrated carriers like Petitioner to transmit traffic to and from service providers that do not have their own networks and are not ubiquitously interconnected with networks of other carriers. Without competition in this market, not only will competitors suffer, consumers will suffer as well. The FCC has repeatedly recognized that competition brings associated consumer benefits through innovation and reduced prices.[33]

The increased number of billing disputes between IXCs and CLECs that would develop surrounding the interpretation and implementation of any order granting AT&T's request would also harm consumers since the money and resources that could have otherwise been spent on investment and innovation would be directed toward negotiating and litigating the billing disputes.[34]

In sum, contrary to AT&T's argument, granting AT&T's request to de-tariff LEC tandem switching and transport access charges will harm and not benefit consumers. AT&T's Petition must be denied.

F. The Petition Must be Denied Since it is Not Necessary to Ensure Just, Reasonable and Non-discriminatory Rates.

The damage caused to competition and consumer welfare in the transit/tandem switching and transport markets described above and competitive and consumer harm that would result in the 8YY market by the granting of AT&T's Petition will undoubtedly lead to unjust, unreasonable and discriminatory rates.

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[33] ICC Reform Order at para. 1009 (citing *Interconnection Clarification Order*, 26 FCC Rcd at 8265-66, paras. 12-13; *Local Competition First Report and Order*, 11 FCC Rcd at 15506, para. 4; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Third Report and Order, Transport Phase II, 9 FCC Rcd 2718, 2724, para. 25 (1994).

[34] *See* ICC Reform Order at para. 705.

AT&T touts the benefits of replacing tariffed pricing with negotiated commercial agreements between carriers for access services.[35] Unfortunately, negotiated commercial agreements do not always lead to just, reasonable and non-discriminatory rates, terms and conditions between carriers and tariffing continues to benefit CLECs in a variety of ways. First, tariffing of access charges generally yields significant efficiencies. In particular, it reduces transaction costs by eliminating the need for a CLEC to devote substantial time and resources to negotiating countless individual agreements with countless different carriers. It is also more efficient for other carriers to assess access charges on other carriers through tariffs rather than negotiated agreements. Second, tariffs can be used to impose access charge payment obligations in instances where one or both carriers do not have a duty to negotiate an interconnection agreement in good faith.

De-tariffing and relying on commercial agreements is another major issue that the FCC inquired about in its intercarrier compensation FNPRM, specifically in the context of IP to IP interconnection. The FCC asks: Has the Commission through its actions in this Order, sufficiently eliminated disincentives to IP to IP interconnection arising from intercarrier compensation rules? Even if there were no disincentive arising from the intercarrier compensation rules, would some competitors seek to deny IP-to-IP interconnection on reasonable rates, terms and conditions to rise their rivals' costs?[36] The Commission recognized, "a provider might not always voluntarily grant another provider access to its network on just and reasonable rates, terms and conditions and that, in certain circumstances, some regulatory

[35] AT&T Petition at pp. 6-8.
[36] See FNPRM at paras. 1375 - 1377.

protections might be warranted."[37] These are valid questions not only in the context of IP-to-IP interconnection but also in the broader context of de-tariffing CLEC access charges.

With regard to IP to IP interconnection, both AT&T and Verizon have thus far refused repeated requests from O1 for IP to IP interconnection. Moreover, O1, a small CLEC, has learned through its experience over the last several years attempting to negotiate switched access rates and traffic exchange agreements with large vertically integrated carriers, including AT&T and Verizon affiliates, that regulatory protections are absolutely required to ensure just, reasonable and non-discriminatory treatment. This is particularly true with regard to the non-ILEC AT&T and Verizon entities that to date have not been required to negotiate direct interconnection in good faith under Section 251 of the Act.

For instance, as referenced briefly above, AT&T Mobility and O1 were in the process of negotiating updated terms to their previous direct connection and traffic exchange agreement when AT&T unilaterally disconnected the direct facilities because O1 did not accept unreasonable routing and discriminatory pricing terms that AT&T sought to impose on O1. O1 sought relief from the California Public Utilities Commission ("CPUC"), asking it to require AT&T Mobility to negotiate in good faith and maintain the direct connections. Unfortunately, however, the CPUC found that the federal Communications Act did not obligate AT&T Mobility to negotiate in good faith to offer direct interconnection to CLECs and dismissed O1's Complaint as a matter of law based on that conclusion.[38] O1 had even presented evidence in its written testimony filed with the Commission, including copies of the agreements, demonstrating that

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[37] Id at para. 1377 (citing *CMRS Interconnection Second NPRM*, 10 FCC Rcd at 10682-83, paras. 31-32. *See also, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5327, para. 199 (discussing incumbent LEC concerns about the ability to negotiate access to electric utilities' pole networks on just and reasonable rates, terms, and conditions, notwithstanding the fact that the incumbent LEC itself owns a pole network)

[38] *O1 Communications, Inc. v. New Cingular Wireless PCs, LLC,* Case No.C.15-12-020 (filed Dec. 28, 2010); CPUC Decision No. 16-09-005 (Sept. 15, 2016). O1 disagrees with the CPUC's conclusion and filed a Motion for Rehearing on Oct. 20, 2016, which is currently pending.

AT&T Mobility had discriminated against O1 by entering into direct connection agreements with other CLECs under the terms and conditions that were sought by O1 but were rejected.[39] Because the Complaint was dismissed as a matter of law because direct connection was not required by the Act, O1 was precluded from presenting this evidence of discrimination to the Commission through summary judgment or in a hearing. O1 lost numerous customers and substantial amounts of revenue as a result of AT&T's discrimination. This is a clear example of the unjust, unreasonable and discriminatory results that occur when carriers are left to commercial negotiations, particularly with carriers that hold market power, instead of being able to rely on regulatory backstops to level the playing field.

O1 is not the only CLEC that been subjected to AT&T's unjust, unreasonable and discriminatory negotiations tactics. Another CLEC aptly describes its experience with AT&T IXC as follows:

> Rather than abiding by the tariffs of its other, competing carriers, AT&T through a *modus operandi* of dispute, litigation, coercion, nonpayment and, above all, delay, forces carrier after carrier to enter individual specific contracts with AT&T for preferential rates .... AT&T seems to pay no carrier its full tariffed rates, and then through the withering process of litigation by attrition, enters into unique, discriminatory settlement agreements at different rates and at different times with each carrier. AT&T can thus successfully manipulate its competitors, playing favorites, rewarding some and punishing others at will. Absent judicial oversight and the discipline of Sections 201 and 202, AT&T and not the FCC or the courts

[39] O1 Communications, Inc. Motion for Partial Summary Judgment, Case No. C-15-12-020 filed Aug. 17, 2016.

will continue to be the arbiter of whether and what rates are paid, and AT&T will be encouraged to continue to ignore repeated FCC orders.[40]

A third CLEC expressed its lack of bargaining power during negotiations with large IXCs over access charges as feeling as if it would be "crushed like a grape."[41]

If this Commission de-tariffs tandem access charges and 8YY dip charges, and allows the market to be subject only to commercial negotiations, the lack of Commission oversight of negotiations between small CLECs like these and large vertically integrated carriers with market power like AT&T would continue to lead to unjust, unreasonable and discriminatory results. In addition to all of the other reasons set forth herein, because AT&T has failed to demonstrate that granting AT&T's Petition is necessary to ensure just, reasonable and non-discriminatory rates for tandem switched access and 8YY dip charges, the Petition should be denied.

IV. CONCLUSION

Because AT&T has not and cannot clearly define the scope of its proposed forbearance regarding tandem switching and transport charges, AT&T's Petition with regard to these rate elements must be denied. The Commission must also deny AT&T's Petition as a whole because AT&T has failed to satisfy its burden to demonstrate that forbearance is necessary to ensure just and reasonable rates, consumer benefits and the public interest.

To the contrary, granting AT&T's Petition would severely handicap competition in the market for intermediary services, unfairly benefit the ILECs, including AT&T's affiliate, which currently hold market power in that market. In addition, granting AT&T's Petition with regard to 8YY dip charges would unfairly benefit 8YY providers such as AT&T and their customers by

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[40] Brief in Support of Broadvox-CLEC, LLC's Motion for Summary Judgment, Broadvox-CLEC LLC v. AT&T Corporation, Case No. PWG-13-1130, U.S.Dist.Ct. D. MD, filed Jul. 10, 2015 at pp. 60-61.

[41] Qwest Communications Company, LLC v. tw telecom of California, L.P. CPUC Decision No. 16-20-020 (Feb. 25, 2016) 2016 Cal. PUC LEXIS 103 at p. 10.

requiring their competitors and their customers to subsidize 8YY services and forgo compensation for the services they provide to enable 8YY providers to earn revenue. Moreover, granting AT&T's request to de-tariff LEC access services and rely on commercial agreements instead would lead to further abuse by carriers with market power by permitting them to pick and choose winners and losers by entering into agreements with favorable rates, terms and conditions for some and denying those same rates, terms and conditions to others.

For all these reasons, AT&T's Petition must be denied.

Dated this 2nd day of December 2016.

By: _____

Michel Singer Nelson
Counsel and Vice President of Regulatory and Public Policy
O1 Communications, Inc.
4359 Town Center Blvd, Suite 217
El Dorado Hills, CA 95762
mnelson@o1.com
916 235 2028